SURENTHERAN SELVARAJA

v.

PP

COURT OF APPEAL, PUTRAJAYA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
NIK HASHIM JCA
[CRIMINAL APPEAL NO: W-09-15-2002]
10 MARCH 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 12(2) - Unlawful possession of 6.44g of heroin and monoacetylmorphines - Appeal against conviction and sentence - Proof of possession, whether established - Imprisonment of 10 years, whether proper as accused was first offender*

CRIMINAL PROCEDURE: *Sentence - Possession of drugs - Statutory policy of grading severity of penalty according to amount of drug - In what circumstances should sentence of imprisonment adhere to such policy*

The police found the appellant with a plastic bag ('the bag') that contained 40 small packets of drugs in powder and granular form in a car driven by the appellant. The bag was found between the feet of the appellant below the driver's seat where the appellant was seated. The Sessions Court found proof of possession and convicted the appellant under s. 12(2) of the Dangerous Drugs Act 1952 ('DDA') for unlawful possession of 6.44g of a mixture of heroin and monoacetylmorphines. He was sentenced under s. 39A(2) DDA to ten years' imprisonment and the mandatory minimum of ten strokes of whipping. The High Court dismissed his appeal against conviction and sentence and the appellant now appealed to the Court of Appeal.

Held (dismissing appeal against conviction but allowing appeal against sentence)
Per Abdul Aziz Mohamad JCA delivering the judgment of the court:

[1] The inescapable inference from the position of the bag found in the car was that the appellant willed it to be there so that he could guard it. Thus, he was in custody or in control of the bag. Further, the fact that he was driving his own car and that there was no one else in the car meant that he alone was concerned with the presence of the bag in the car. The fact that he needed to guard it showed that he knew the bag contained packets

of the dangerous drugs. Even if the proven circumstances were insufficient as proof of knowledge, the presumption of s. 37(d) DDA was applicable. As such, the conviction should be upheld. (p 270 a-f)

[2] There is a statutory policy of grading the severity of penalties according to the amount of drug. No matter how important are questions as those of public interest, in a case that does not have aggravating circumstances, such as a previous conviction, the sentence of imprisonment must, though not necessarily with mathematical accuracy, be made to adhere to that policy. In the present case, the appellant did not have a previous conviction. The ten-year imprisonment, *ie*, half the maximum period of twenty years, for possessing 1. 44g more than the amount for which five years would be the proper penalty had deviated from the grading mentioned above. Accordingly, the term of imprisonment should be reduced from ten to seven years. (p 271 d-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Pihak polis telah menjumpai satu beg plastik ('beg') pada perayu yang mengandungi 40 paket kecil dadah dalam bentuk serbuk dan biji-bijian dalam sebuah kereta yang dipandu oleh perayu. Beg dijumpai di antara dua kaki perayu di bawah tempat duduk pemandu yang diduduki perayu. Mahkamah Sesyen mendapati wujud bukti pemilikan dan dengan itu telah mensabitkan perayu di bawah s. 12(2) Akta Dadah Berbahaya ('DDA') kerana memiliki 6.44 gram campuran heroin dan monoacetylmorphines. Perayu dijatuhkan hukuman 10 tahun penjara dan dikenakan 10 sebatan iaitu jumlah sebatan mandatori paling rendah di bawah s. 39A(2) DDA. Mahkamah Tinggi telah menolak rayuan perayu terhadap sabitan dan hukuman dan perayu merayu ke mahkamah ini.

Diputuskan (menolak rayuan terhadap sabitan tetapi membenarkan rayuan terhadap hukuman)
Oleh Abdul Aziz Mohamad HMR menyampaikan penghakiman mahkamah:

[1] Dari posisi beg di dalam kereta yang ditemui itu, rumusan yang tak dapat dielakkan adalah bahawa perayu berkehendakkan ia berada di situ supaya beliau dapat mengawalnya. Perayu dengan itu mempunyai jagaan atau kawalan ke atas beg tersebut. Selain itu, fakta bahawa beliau memandu keretanya sendiri dan bahawa tidak terdapat orang lain dalam kereta tersebut bermakna bahawa hanya beliau sahaja yang berurusan dengan beg di dalam kereta itu. Fakta bahawa beliau perlu menjaganya menunjukkan bahawa beliau mengetahui paket-paket itu mengandungi dadah berbahaya.

Sekiranya pun halkeadaan yang terbukti tidak mencukupi sebagai bukti pengetahuan, anggapan s. 37(d) DDA adalah terpakai. Oleh kerana itu, sabitan perlu dikekalkan.

[2] Terdapat suatu dasar yang menetapkan tahap kekerasan hukuman dengan berpandu kepada jumlah dadah. Walau bagaimana mustahak sekalipun unsur kepentingan awam, di dalam kes di mana unsur-unsur yang memburukkan keadaan, seperti sabitan-sabitan lampau, tidak wujud, maka hukuman pemenjaraan hendaklah dipastikan mematuhi dasar berkenaan, walaupun tidak dengan ketepatan matematika. Dalam kes semasa, perayu tidak mempunyai sebarang sabitan lampau. Menjatuhkan hukuman 10 tahun penjara, iaitu separuh dari hukuman maksima 20 tahun penjara, kerana memiliki 1.44 gram lebih dari had yang mewajarkan hukuman lima tahun penjara, adalah menyimpang dari dasar ini. Tempoh pemenjaraan, dengan itu, harus dipendekkan dari sepuluh tahun kepada tujuh tahun.

Case(s) referred to:
Kesavan Petchayo v. PP [2003] 1 CLJ 846 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Toh Su Kuan v. PP (Criminal Appeal No: D-05-82-1998) (Unreported) ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), (3), 37(d), 39A(1)(d), (2)(d)

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Lee Lay Choo DPP

[Appeal from High Court, Kuala Lumpur; Criminal Appeal No: 42-47-2001]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad JCA:

The appellant was convicted in the Sessions Court in Kuala Lumpur of the offence under s. 12(2) of the Dangerous Drugs Act 1952 of unlawful possession of 6.44 grammes of a mixture of heroin and monoacetylmorphines and was sentenced under s. 39A(2) to ten years imprisonment and the mandatory minimum ten strokes of whipping. The High Court dismissed his appeal against conviction and sentence. He now appeals to this court. The appeal is also as regards conviction and sentence.

On the evening of 13 July 2000, the appellant was driving, with no one else with him, a Proton Saga Aeroback motor car, of which he had been the registered owner since 1999, when at about 8.30 he stopped in front of the Maybank building in Kampung Baru, Kuala Lumpur, and was pounced upon by the police who were on the lookout for him. In the motor car, on the floor of the driver's section, was found a red plastic bag containing forty small plastic packets in four bundles, each of ten packets held together by a rubber band. The packets contained the drugs in powder and granular form.

There were two photographs that had been tendered as exhibits in the Sessions Court but were not included in the appeal record. We obtained these subsequent to the hearing of the appeal. Photograph P1C is one where the leader of the police party, Inspector Mohd. Azam, had marked with an X the position in the car where the plastic bag was found. Photograph P1D is a photograph of the plastic bag, the forty plastic packets and the four rubber bands. From photograph P1D we observe that the bag was a simple bag made of thin light plastic, the kind that shopkeepers provide for customers to carry away groceries or household provisions in. From the marking X in photograph P1C and the size of the bag as we judge it from photograph P1D, we conclude that the bag would have been between the feet of the appellant were the appellant to be seated normally in the driver's seat with legs straight down and not stretched out towards the pedals and would have fully occupied the space between the two feet.

After the close of the case for the prosecution, the learned DPP submitted that those facts (and another which we will mention later on) constituted evidence that the appellant had custody or control of the forty plastic packets and also knowledge that they contained the drugs and that therefore there was proof of possession. He further submitted that if the court was unable to find possession by direct evidence, he relied on the presumption under s. 37(d), which provides that in all proceedings under the Act:

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

The learned Sessions Court judge, as appears from her grounds of judgment, found, on those facts, that there was direct evidence of possession. She did not invoke the presumption. She accordingly called upon the appellant to enter upon his defence, at the end of which she convicted him.

Before us, Encik Karpal Singh for the appellant presented only one argument against conviction, namely that on the facts there was no evidence of the knowledge that was required to constitute possession. In effect his argument was that the facts did not necessarily justify the inference of knowledge. In relation to this argument, he particularly pointed out that it was a misdirection for the Sessions Court judge to take into consideration, as tending to show knowledge, the fact of the appellant's remaining silent when the bag was opened and the packets were shown to him just after the bag was found.

Actually the Sessions Court judge did not, in finding knowledge, take the evidence of the appellant's negative conduct of remaining silent into consideration. Although at the top of p. 6 of her grounds of judgment she did refer to that evidence, it is clear to us that in the last paragraph on that page, where she made her finding as to knowledge, she did not take the evidence of the appellant's negative conduct into consideration. It was the appellate judge in the High Court who, at pp. 23 and 24 of his grounds of judgment, particularly in paragraph (iv) at p. 24, said that the trial judge also took that evidence into consideration in finding a *prima facie* case. That was an error.

Indeed, during the trial itself the prosecution never sought to rely on the evidence of negative conduct of silence in order to prove knowledge. The evidence of the negative conduct emerged only in the cross-examination of Inspector Mohd. Azam, in his answer to the question whether the appellant admitted the drugs were his. Counsel merely wanted confirmation that the appellant did not so admit – which was absolutely unnecessary because it was never said that he did – and the confirmation was given by the answer that the appellant was silent when the bag was opened. Later on, also in cross-examination, the Inspector said that when the drugs were shown to the appellant at any time, he did not admit it was his. That again must have been in response to counsel's efforts to obtain similar confirmation. On the contrary, what the prosecution relied on was evidence of positive conduct of the appellant's being in a state of fear when the car door was opened. This emerged in the examination-in-chief of Inspector Mohd. Azam. And in submission at the close of the prosecution case the DPP said that the appellant's being "gamam dan terkejut" meant that he had knowledge. It was never submitted that the negative conduct of being silent meant that the appellant had knowledge. But in the appeal before us the learned DPP did not rely on the evidence of positive conduct as one of the factors from which knowledge could be inferred. She instead relied on the evidence of negative conduct of remaining silent as one of the factors, which was not fair since such evidence was not relied on during the trial.

So we have to exclude the negative conduct of remaining silent from our minds and consider only the other factors. The question to be answered is whether, from the circumstance that the bag was in the position as already described on the floor of the driver's side of the appellant's car which he was driving without any other occupant, it would be correct to conclude, as a matter of inference, that it is beyond reasonable doubt that the appellant knew that the bag contained the packets and that the packets contained the dangerous drugs.

In arguing against the finding, made at the close of the case for the prosecution, of knowledge and therefore of possession, Encik Karpal Singh relied on the decision of this court in *Toh Su Kuan v. Pendakwa Raya* (Rayuan Jenayah No. D-05-82-1998) where the circumstances were very much stronger against the appellant in that case than those in this case and this court held that they were insufficient to constitute proof of possession. The appellant in that case was charged with the capital offence of trafficking in 1,584.93 grammes of heroin and was sentenced to death in the High Court. The evidence for the prosecution was that the drug was found in 356 packets in different parts of the appellant's person: 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back. This was what Gopal Sri Ram JCA said:

> In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew the packets contained heroin, the drug which forms the subject matter of the charge.

There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances. For that reason we consider that the decision in *Toh Su Kuan* is not relevant for our deliberations.

In the present case, the inescapable inference from the fact that the bag was so placed in relation to the appellant in the car as has been described can only be that he knew of the existence of the bag. From the fact that he allowed the bag to remain there while he was driving, whereas normally a driver would not allow an object to remain on the floor in his part of the car to be a potential obstruction to his footwork while driving, the inescapable inference is that he willed the bag to be there in order to guard it and that therefore he was in custody or control of it. From the fact that it was his own car that he was driving and that there was no one else in the car, the inescapable inference is that he alone was concerned in the presence of the bag in the car. From the fact that he needed to guard the bag, the inescapable inference is that he knew that the bag contained packets of the dangerous drugs. It was not for the court, at the close of the prosecution case, to provide a defence for the appellant and speculate on the probability that, for example, someone else had left the bag in the appellant's car without his knowledge. Unless there were elements in the evidence of the prosecution case itself pointing to such a probability, it must not be entertained. In this appeal nothing has been pointed out from the evidence for the prosecution as indicating, against the inescapable inference against him, a probability that the appellant had no knowledge of the existence of the drugs. We are therefore satisfied that the Sessions Court judge was right in finding at the close of the prosecution case that the prosecution had established possession by evidentiary proof, and we accordingly dismiss the appeal as regards conviction.

Even if the proven circumstances were insufficient as proof of knowledge, we would apply the presumption of s. 37(d). When we mooted the idea during the hearing of the appeal, Encik Karpal Singh was not able to argue convincingly against it. We are satisfied that the appellant had in his custody or in his control the bag and the packets containing the drugs. The presumption is a mandatory although rebuttable presumption. It has to be applied where the facts on which to base it are established, except in a capital charge of trafficking that relies on the statutory presumption of trafficking, because the Federal Court in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 held that it was wrong to use the presumption under s. 37(d) to invoke the statutory presumption of trafficking. That must have been the reason why in *Toh Su Kuan, supra*, the prosecution did not rely on the mandatory presumption of knowledge under s. 37(d).

We now turn to the question of the sentence. The appeal had to be against the period of imprisonment only, because the ten strokes of whipping that were imposed were mandatory. Encik Karpal Singh's point essentially was that the term of ten years is excessive in view of the amount of the drugs involved.

The substance in this case was a mixture of heroin and monoacetylmorphines of total weight 6.44 grammes. The offence was possession under s. 12(2). The imprisonment imposed was ten years. If the amount is less than 2 grammes the penalty, according to s. 12(3) read with s. 39A(1)(d), is a fine not exceeding RM100,000 or imprisonment for any term not exceeding five years or both. If the amount is 2 grammes or more but less than 5 grammes,the penalty of imprisonment is mandatory and the term is, according to s. 39A(1)(d), between two years and five years. So if the amount is 4.99 grammes, imprisonment of five years would be justified. If the amount is 5 grammes or more but less than 15 grammes, imprisonment is mandatory, and the term, according to s. 39A(2)(d), is five years to life, which means twenty years. So if the amount is 5 grammes, imprisonment for five years would be justified. And if the amount is 14.999 grammes, imprisonment for life, that is twenty years, would be justified. If the amount is 15 grammes or more, according to s. 37(da)(iiia) trafficking is presumed, and the penalty for trafficking is death.

There seems to be a statutory policy of grading the severity of penalty according to the amount of drug. Bearing that in mind, no matter how important are such questions as that of public interest, in a case that does not have aggravating or suchlike circumstances, such as a previous conviction – and the appellant does not have a previous conviction – the sentence of imprisonment must, as far as possible, though not necessarily with mathematical accuracy, be made to adhere to that policy. It would be manifestly wrong, for example, although allowed by s. 39A(2)(d), to sentence a first offender to life imprisonment for possession of a mere 5 grammes, as it would be manifestly wrong, although so allowed, to sentence an offender, even though a first offender, to only five years for possession of 14.999 grammes, in the absence of special mitigating circumstances.

In this case it does appear to us that imprisonment for half the maximum period of twenty years for possessing 1.44 grammes more than the amount for which five years would be the proper penalty does deviate from the grading. Ten years would be justified for possession of 10 grammes.

We, however, do not agree with Encik Karpal Singh's argument insofar as it proceeds from beyond the statutory grading in that it uses for comparison the sentence in *Kesavan a/l Petchayo @ Balakrishnan v. Pendakwa Raya* [2003] 1 CLJ 846, which was eighteen years for possession of as much as 17 grammes, more than three times the "trigger point" of 5 grammes for s. 39A(2)(d). Encik Karpal's point was that if for 12 grammes more than the trigger point the sentence was eighteen years, for just 1.44 grammes in excess

of the trigger point the period should be reduced accordingly. That case was, however, a case where the accused was originally charged for trafficking by presumption from possession but the conviction was substituted on appeal with one for possession under s. 12(2). Such a case, including cases where for some reason or other the prosecution decide not to charge for trafficking persons in possession of more than 15 grammes, ought not to be used as comparison in determining the period of imprisonment for possession of less than 15 grammes. The reason is that in such cases the amount could be any amount from 15 grammes upwards, such as, for example, 1000 grammes, and yet the maximum imprisonment possible remains at twenty years (life). But in view of our earlier observations about the statutory grading of penalties, we would reduce the term of imprisonment to seven years.

Accordingly, while dismissing the appeal against conviction, we allow the appeal against sentence and reduce the term of imprisonment to seven years.